In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-180

GATEWAY CENTER CORPORATION, PETITIONER

v.

JOHN W. MERRIAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION[1]

1. This is an action by an unsuccessful lessor of office space (John W. Merriam) to invalidate a lease negotiated by the General Services Administration ("GSA") with another lessor. After negotiating with several persons, GSA accepted an offer by the Gateway Center Corporation ("Gateway") to enter into a long-term lease to the government of a privately owned building in Philadelphia. The district court granted summary judgment to the government, holding that Merriam lacked standing to sue.[2] The court of appeals

[1] The Administrator was a party in the court of appeals and accordingly is a party respondent in this Court (Rule 21(4) of the Rules of this Court), although he is not listed in the caption.

[2] Because of its disposition of the case, the district court did not reach the merits. The award was also appealed to the General Accounting Office, which upheld the transaction.

reversed, holding that Merriam had standing under 41 U.S.C. 253 and a line of decisions of the United States Court of Appeals for the District of Columbia Circuit beginning with *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F. 2d 859.

2. The government disagrees with the *Scanwell* decision, which is inconsistent with this Court's ruling in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. Nonetheless, we do not believe that this case, in its present posture and as we interpret the opinion of the court of appeals, is an appropriate vehicle for this Court to consider the issue. Accordingly, the government appellees have not petitioned for a writ of certiorari.

This case is unlike the typical disappointed bidder cases which have arisen under *Scanwell*, since here the court of appeals concluded that the complaint alleged in effect a fraud by a competing bidder in the inducement of the contract award. Furthermore, the complaint relies primarily and directly upon a statutory provision rather than upon implementing procurement regulations adopted by the government solely for the guidance of its procurement officials. Finally, the court of appeals acted on the mistaken assumption that competitive bidding rather than a negotiated contract was involved.[3] In its opinion denying rehearing, however, the court of appeals indicated that the record could be corrected in that respect on remand (Pet. App. 89a):

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[3] The record shows that the district court and the parties were aware that this was a negotiated contract. See plaintiff's complaint, pp. 5, 9, 10, 12, 16; district court opinion Pet. App. 38a, para. 2; GAO letters, Pet. App. 19a, 20a; all referring to "negotiations," and to the original "solicitation for offers." Technically, competitive procurement is initiated by an "invitation for bids," and is governed by 41 U.S.C. 253. Negotiated procurement is initiated by a "solicitation for offers," and is governed by 41 U.S.C. 254.

> Our holding is limited to a reversal of a grant of summary judgment, however, and does not foreclose the district court from considering a different theory of defense to the action on a different record if it deems that course to be proper. As was suggested in note 7 to the panel opinion, the district court must also consider whether Merriam may have standing even aside from the Federal Property and Administrative Services Act of 1949.

We believe that, in general, potential suppliers do not have a sufficient legal interest to challenge the award of contracts reached *either* by competitive bidding or negotiation (whether or not competitive). The case against such suits is strongest, however, where a negotiated contract is involved, for the government then must evaluate competing proposals upon the basis of a number of factors, including price, design, the firm's abilities and sometimes location of the property. Typically, negotiated contracts relate to products or services that cannot be readily mass produced or are otherwise unique, such as major office complexes. Accordingly, the government has even broader discretion in selecting its supplier in such procurements than it has in procurement through competitive bidding. In any event, since this case was decided on an erroneous premise which is subject to correction in later proceedings, it is not ripe for review.

In these circumstances, we do not believe that the Court should grant the petition. If, however, the Court should conclude, contrary to our belief, that the court of appeals has definitively determined that this was a competitively-let rather than a negotiated contract, then the case would present an important issue warranting review. As indicated above, permitting potential suppliers to challenge the award of government contracts

to competitors would cause serious interference with th proper operation of the vast procurement activities o the federal government. We think that unsuccessfu suppliers cannot challenge an award of even a competi tively-bid contract. If the court of appeals has permitte unsuccessful suppliers to challenge the award of negotiated contract, this would constitute an even mor serious interference with government procurement. decision with such a significant impact would, we believ clearly warrant review by this Court.

If the petition is granted, however, we would suppor the petitioner's contention that Merriam did not have legal interest sufficient to maintain the suit, as we as its contentions with regard to applicability of th Independent Offices and Department of Housing an Urban Development Appropriation Act, 1971 and th Public Buildings Act Amendments of 1972.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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